SUBJECT INDEX

Page

Opposition to motion for leave to file supplemental complaint or original complaint 1

Motion to dismiss United States v. California, No. 5, Original 4

Memorandum of the State of California in support of its opposition to the motion of the United States and in support of its motion to dismiss United States v. California, No. 5, Original 5

Statement 5

I

The United States should be denied leave to file a supplemental complaint in United States v. California, No. 5, Original 8

II

The proposed pleading may not be treated as an "original complaint in the nature of a supplemental complaint" 12

III

It would not be in the interests of orderly procedure nor of a prompt and equitable determination of the present controversy to permit it to be brought before the court by supplementary proceedings 13

A. Subsequent events have vitally affected the facts and principles considered determinative by the special master 13

B. A new proceeding need not involve re-presentation of relevant evidence 19

IV

Page

The District Courts of the United States have concurrent jurisdiction over the present controversy and constitute the most suitable forum for its resolution 20

V

The case of United States v. California, No. 5, Original, should be dismissed 23

A. The passage of the Submerged Lands Act rendered this case moot..... 23

B. This case also should be dismissed for failure of prosecution..... 25

Conclusion 27

TABLE OF AUTHORITIES CITED

Cases	Page
Alabama v. Texas, 347 U. S. 272	15
Ames v. Kansas, 111 U. S. 449	20
Brill v. General Industrial Enterprises, 234 F. 2d 465	10
Brownlow v. Schwartz, 261 U. S. 216	23-24, 25
California v. San Pablo and Tulare Railroad, 149 U. S. 308	25
California v. Southern Pacific Co., 157 U. S. 229	21
Case v. Bowles, 327 U. S. 92	20
Collings v. Bush Mfg. Co., 19 F. R. D. 297	10
Dugas v. American Surety Co., 300 U. S. 414	10, 11
Gay v. Ruff, 292 U. S. 25	23
Georgia v. Chattanooga, 264 U. S. 472	22
Georgia v. Pennsylvania R. Co., 324 U. S. 439	21
Haarmann-DeLaire-Schaffer Co. v. Leudere, 135 Fed. 120	13
Hertz v. Graham, 23 F. R. D. 17	19
Hesselberg v. Aetna Life Insurance Co., 102 F. 2d 23	9
Independent Coal Co. v. United States, 274 U. S. 640	13
Janousek v. Wells, 303 F. 2d 118	26
Lang v. Choctaw O. & G. R. R., 160 Fed. 355	9
Ling v. Wabash R.R., 370 U. S. 626	26
Massachusetts v. Missouri, 308 U. S. 1	22
Messenger v. United States, 231 F. 2d 328	26
Osage Oil and Refining Co. v. Continental Oil Co., 34 F. 2d 585	10, 11

Page

Parker v. Ellis, 362 U. S. 574 24

Pollard's Lessee v. Hagan, 3 How. 212 16

Puget Sound Power and Light Co. v. City of Seattle, 271 Fed. 958 25

Ruch v. Rock Island, 97 U. S. 693 19

Superior Oil Co. v. Fontenot, 213 F. 2d 565 .....15, 16

Sweeney v. Anderson, 129 F. 2d 756 26

Thompson v. Maxwell, 95 U. S. 391 13

United States v. Alaska S.S. Co., 253 U. S. 113 24–25

United States v. California, 332 U. S. 19 .....1, 3, 4, 5, 6, 15, 23

United States v. City of Brookhaven, 134 F. 2d 442 10

United States v. Florida, 363 U. S. 121 16

United States v. Hamburg American Co., 239 U. S. 466 25

United States v. Louisiana, 340 U. S. 899 11

United States v. Louisiana, 363 U. S. 1 16

United States v. Southern Pacific Co., 75 Fed. Supp. 336 20

United States v. State of Washington, 233 F. 2d 811 .....20, 21

Miscellaneous

106 Congressional Record, pp. 11174-11192 18

Convention on the Territorial Sea and the Contiguous Zone, after the Geneva Conference of 1958 (U. N. Doc. A/Conf. 13/L. 52) 8, 18

44 Department of State Bulletin, p. 609 18

Page

28 Federal Register (April 3, 1963), p. 3218..... 18

Geneva Conference of 1958 17

Geneva Conference of 1960 17

Official Records, U. N. General Assembly, 11th Sess., Supp. No. 9 (1956) (U. N. Doc. A-3159).. 17

Report of Special Master (Under Order of June 27, 1949) 6, 19

Report of Special Master (Under Order of December 3, 1951), dated October 14, 1952.....6, 7, 13, 14

Rules

Federal Rules of Civil Procedure, Rule 15.....9–10

Federal Rules of Civil Procedure, Rule 41(b)..... 26

Rules of the United States Supreme Court, Rule 9(2) 26

Statutes

67 Statutes at Large, p. 29 .....7, 14

67 Statutes at Large, p. 462 .....8, 16

United States Code, Title 28, Sec. 1251(b)(2)....3, 21

United States Code, Title 28, Sec. 1254(1)..... 23

United States Code, Title 28, Sec. 1345..... 21

United States Code, Title 28, Sec. 2101(e)..... 23

United States Code, Title 43, Secs. 1301-1315 .....7, 14

United States Code, Title 43, Secs. 1331-1343 .....8, 16

United States Code, Title 43, Sec. 1336..... 17

Textbooks

2 American Society of International Law, International Legal Materials No. 3 (May, 1963), p. 528 18

Page

Shalowitz, Boundary Problems Raised by the Submerged Lands Act, 54 Columbia Law Review (1954), pp. 1021, 1042-1043 15

Story, Equity Pleadings (10th Ed. 1892), p. 327 10

Story, Equity Pleadings (10th ed. 1892), Sec. 338.... 9

Story, Equity Pleadings (10th Ed. 1892), Sec. 345, pp. 333-334 12

Story, Equity Pleadings (10th Ed. 1892), Sec. 404.... 9

5 Wigmore, Evidence (3d Ed. 1940), Sec. 1388, p. 93 19

IN THE

Supreme Court of the United States

October Term, 1962.
No. 5, Original.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

State of California's Opposition to United States Motion for Leave to File Supplemental Complaint or Original Complaint and Motion of the State of California to Dismiss United States v. California, No. 5, Original

OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT OR ORIGINAL COMPLAINT

The State of California, in opposition to the United States Motion for Leave to File Supplemental Complaint or Original Complaint,* prays as follows:

(1) That the United States be denied leave to file a supplemental complaint in *United States v. California,* No. 5, Original; and

(2) That the United States be denied leave to file an original complaint in this Court, without

*Hereinafter for convenience referred to as the United States Motion.

prejudice to its filing a suit in an appropriate District Court; or

(3) Alternatively, in the event leave is granted to file an original complaint in this Court, that such complaint be deemed to commence a new and separate suit for all purposes, and that it not be deemed "in the nature of a supplemental complaint."

This opposition of the State of California is made on the following grounds:

1. Since the United States has itself asserted (on page 2 of its motion) that ". . . the effect of the 1947 decree [in *United States v. California*] was terminated by the Submerged Lands Act, which gave to the State of California the same submerged lands of the marginal belt that were the subject of the decree, . . ." it is clear from the face of the United States Motion that that suit has terminated and may not be revived in the guise of supplementary proceedings.

2. The proposed complaint may not be deemed to be "in the nature of a supplemental complaint" since the former decree has become *functus officio*, is not invoked or relied upon by either party, and requires no protection, implementation, or construction.

3. Even if otherwise permissible, a supplementary complaint (or complaint in the nature thereof) would not be proper herein since, during the ten year period this case has lain dormant, the situation has been so affected by legislation, court decisions, international law developments, and practical considerations affecting the

areas requiring adjudication, that any attempt to revive the old proceedings and act on the basis of outdated recommendations would actually impede a prompt and equitable resolution of the questions involved; and furthermore, such a procedure is not necessary in order to take advantage of testimonial and documentary evidence presented in the former proceedings, to the extent such evidence may be relevant to the present controversy.

4. The District Courts of the United States have concurrent jurisdiction over the present controversy [28 U. S. C. §1251(b)(2)] and, on the basis of convenience, efficiency, and justice, constitute the most suitable forum for its resolution.

5. The proceedings in *United States v. California*, No. 5, Original, should be dismissed pursuant to the following motion of the State of California.

STANLEY MOSK
Attorney General of California

July 1963

MOTION TO DISMISS UNITED STATES V. CALIFORNIA, NO. 5, ORIGINAL

The State of California moves that this Court dismiss all supplementary proceedings in *United States v. California,* No. 5, Original.

This motion is made on the following grounds:

1. The case has been rendered moot by the enactment of the Submerged Lands Act of 1953, the consequent termination of the jurisdiction reserved by this Court in its decree of October 27, 1947, and the unavailability of any further relief by supplementary proceedings herein.

2. The plaintiff has failed to take any prosecutory action herein for a period exceeding ten years prior to the filing of its present Motion.

STANLEY MOSK
Attorney General of California

July 1963

MEMORANDUM OF THE STATE OF CALIFORNIA IN SUPPORT OF ITS OPPOSITION TO THE MOTION OF THE UNITED STATES AND IN SUPPORT OF ITS MOTION TO DISMISS UNITED STATES V. CALIFORNIA, NO. 5, ORIGINAL

Statement

The original complaint in *United States v. California,* was summarized by this Court as follows:

> "The complaint alleges that the United States 'is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California.' It is further alleged that California, acting pursuant to state statutes, but without authority from the United States, has negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the lessees have done so, paying to California large sums of money in rents and royalties for the petroleum products taken. The prayer is for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States." 332 U. S. 19, 22-23.

After its decision of June 23, 1947, in *United States v. California*, 332 U. S. 19, this Court on October 27, 1947, for the purpose of carrying that decision into effect, ordered, adjudged and decreed as follows:

> "1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.
>
> "2. The United States is entitled to the injunctive relief prayed for in the complaint.
>
> "3. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree." 332 U. S. 804, 805.

Pursuant to this reserved jurisdiction, the Supreme Court appointed a Special Master, who was directed by a series of three references on February 12, 1949, June 27, 1949, and December 3, 1951, to make procedural and substantive recommendations relating to a determination of the line of demarcation between lands owned by the state and those in which the United States had been held to have paramount rights.

The third and final Report of Special Master (Under Order of December 3, 1951), dated October 14, 1952, dealt with three questions concerning (1) the status of particular channels and water areas between the mainland and offshore islands, (2) the status of seven designated segments along the California shore, and (3) the criteria for ascertaining the ordinary low-water mark on the California coast. The determination of these questions was regarded by the Special Master as being solely a matter of the "territorial jurisdiction of the United States as against foreign countries, *i.e.*, a question of external sovereignty." (Report, p. 6.) No attempt was made to establish a line of demarcation along the entire California coast, but only in the areas and segments designated. Exceptions to this Report were filed by both parties; however, no action was taken thereon and this suit has lain dormant for more than ten years.

During this 10-year period, a number of events have transpired which have had a profound effect upon the posture of the former dispute and a substantial bearing upon the present controversy. Most important was the enactment in May 1953, of the Submerged Lands Act (67 Stats. 29, 43 U. S. C. §§ 1301-1315). This Act moves the federal-state boundary from the ordinary low-water mark and the seaward limits of the state's inland waters, to the state's seaward boundaries, and is determinative of the present rights of the parties. Also of great significance are the following:

(1) Subsequent decisions by this and other courts relating to the construction or effect of the Submerged Lands Act;

(2) The enactment in August 1953 of the Outer Continental Shelf Lands Act (67 Stats. 462, 43 U. S. C. §§ 1331-1343);

(3) Subsequent developments in international law, including United States' approval and ratification in 1961 of the Convention on the Territorial Sea and the Contiguous Zone, after the Geneva Conference of 1958 (U. N. Doc. A/Conf. 13/L. 52); and

(4) Practical considerations, such as advances in offshore drilling technology, which have affected the present desirability of the procedure adopted by the Special Master in limiting adjudication to certain specified areas.

Each of these developments and their vital relationship to the present situation will be discussed more fully below.

I

The United States Should Be Denied Leave to File a Supplemental Complaint in United States v. California, No. 5, Original

As shown above, the United States in the original suit sought and obtained a decree declaring its rights in the lands at issue as against California, and containing an injunction against California and all persons claiming under it from trespassing on these lands in violation of the rights of the United States. The only other provision in the decree is a reservation of jurisdiction solely "to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree."

Although admitting that "the effect of the 1947 decree was terminated by the Submerged Lands Act" (United States Motion, p. 2) and that "there is no longer any dispute over the ownership" of the marginal belt referred to in the decree (United States Motion, p. 7), the United States now seeks to file a supplemental complaint in the same suit seeking an adjudication of its rights in lands having an entirely different boundary. The Government does not purport to explain how the relief which they presently seek comes within the scope of the reserved jurisdiction. The rights which the United States presently asserts are in no way predicated upon the prior decree nor will the relief it seeks be in aid thereof. Any controversy which may now exist arises out of the subsequent Act of Congress, and is unaffected by the terms of the decree.

This Court, of course, has jurisdiction "to entertain a supplemental bill in aid of and to effectuate its prior decrees, and to secure the benefits of a former decree, when further relief to that end is made necessary by subsequent events." *Hesselberg v. Aetna Life Insurance Co.*, 102 F. 2d 23, 27 (8th Cir. 1939). Furthermore, one against whom a decree has been entered may seek to restrain or avoid its effect on the basis of events occurring subsequent to its entry. *Lang v. Choctaw O. & G. R. R.*, 160 Fed. 355, 360 (8th Cir. 1908); Story, *Equity Pleadings* (10th ed. 1892) §§ 338 and 404. In either case, however, the relief sought is the implementation or impeachment of the former decree. Where, as here, the effect of the former decree has terminated, and is not invoked by either party thereto, a party cannot, in the guise of supplementary or amendatory proceedings under Federal Rule of Civil

Procedure 15, seek a new or different judgment and begin a new contest. *Brill v. General Industrial Enterprises,* 234 F. 2d 465, 470 (3d Cir. 1956); *United States v. City of Brookhaven,* 134 F. 2d 442, 446 (5th Cir. 1943); *Collings v. Bush Mfg. Co.,* 19 F. R. D. 297 (S.D.N.Y. 1956). "The supplemental bill, being merely an addition to the original bill, must be consistent therewith and germane thereto." Story, *Equity Pleadings* (10th ed. 1892) p. 327 [fn.(a)].

> "To entitle the plaintiff to file a supplemental bill, and thereby to obtain the benefit of the former proceedings, it must be in respect to the *same title,* in the same person, *as stated in the original bill.*" Id. § 339. (Emphasis added.)

Here, of course, the title to the marginal belt, which was the only area involved in the original bill, is no longer at issue, and the United States is seeking, by means of a supplementary bill, to obtain a declaration as to its rights in other lands. It is submitted that the foregoing authorities clearly establish that such a procedure is prohibited under both modern and traditional usage.

The United States has cited but two decisions in support of its argument in favor of the appropriateness of a supplemental complaint: *Dugas v. American Surety Co.,* 300 U. S. 414, 428 (1937), and *Osage Oil and Refining Co. v. Continental Oil Co.,* 34 F. 2d 585, 588-589 (10th Cir. 1929). (United States Motion, pp. 9 and 10.) Neither of these decisions applies to the present facts; and indeed both are illustrative of the

proper use of a supplementary pleading either to implement or to impeach a prior decree. Neither is authority that a supplemental bill may be used to afford a party new and different relief after the effect of the prior decree has concededly been terminated.

In the *Dugas* case, it was held that a supplementary bill could be filed in a Federal District Court to enjoin a party from the further prosecution of a state court proceeding which contravened the fair intendment of the decrees theretofor rendered by the District Court. Such an injunction, of course, clearly protected and implemented the original decrees. In the *Osage Oil* case, it was stated that a supplemental bill would be proper to bring before the court events occurring subsequent to the decree which allegedly entitled a party to be relieved from a duty enjoined on it by the decree. Here again, relief was predicated upon the continuing effect of the prior decree.

It is significant that in *United States v. Louisiana,* 340 U. S. 899 (1950), the United States previously attempted to obtain modification of this Court's decree in that case so as to litigate issues arising under the Submerged Lands Act. This Court denied the motion to modify that decree [350 U. S. 812 (1955)]. There are even stronger grounds for denying the present United States Motion, wherein the Government seeks not just a modification of the prior decree, but the substitution of a new and different decree relating to lands outside the marginal belt.

II

The Proposed Pleading May Not Be Treated as an "Original Complaint in the Nature of a Supplemental Complaint"

Recognizing that it might not be proper to permit the filing of a supplemental bill under the present circumstances, the United States has attempted to achieve the same result by suggesting that its proposed pleading be treated as an "original complaint in the nature of a supplemental complaint." (United States Motion, p. 12.)

The United States has misconstrued the purpose of an original bill in the nature of a supplemental bill, and the circumstances under which it may be allowed. Such a bill may be filed only where the substantial requirements of a supplemental bill are met, and where certain technical defects, such as a change of parties, prevents the filing of a true supplemental bill. Justice Story makes this clear in the following discussion:

> ". . . This division is founded rather upon formal technical principles, than upon any substantial difference from a supplemental bill, properly so called. Indeed, in the books they are usually confounded together. The most prominent distinction between them, however, seems to be, that a supplemental bill is properly applicable to those cases only, where the same parties, or the same interests, remain before the court; whereas, an original bill in the nature of a supplemental bill is properly applicable, when new parties, with new interests, arising from events since the institution of the suit are brought before the court." Story, *Equity Pleadings* (10th ed. 1892) § 345, pp. 333-334.

The United States has cited three decisions in support of its contentions upon this issue, *i.e., Independent Coal Co. v. United States,* 274 U. S. 640 (1926); *Thompson v. Maxwell,* 95 U. S. 391 (1877); and *Haarmann-DeLaire-Schaffer Co. v. Leudere,* 135 Fed. 120 (S.D.N.Y. 1904).

These decisions completely sustain Justice Story's position that the substantial requirements of a supplemental bill must be met before an original bill will be treated as being "in the nature of" a supplemental bill. In each case, the bill was necessary to bring additional parties before the court in order to protect or implement the original decree, or to secure its benefits for successors in interest to the original parties. We know of no case in which a party has been allowed to utilize this procedure where, as here, the former decree has become *functus officio,* is not invoked or relied upon by either party, and requires no protection, implementation, or construction.

III

It Would Not Be in the Interests of Orderly Procedure nor of a Prompt and Equitable Determination of the Present Controversy to Permit It to Be Brought Before the Court by Supplementary Proceedings

A. Subsequent Events Have Vitally Affected the Facts and Principles Considered Determinative by the Special Master

The United States takes the position that the present controversy can best be resolved if this Court rules upon exceptions filed to the "Report of Special Master (Under Order of December 3, 1951)." This Report

and these exceptions have been on file for over ten years, during which time no steps have been taken to secure a ruling thereon, prior to the present United States Motion. It is California's position that the reason for this prolonged inactivity is the recognition by all concerned that the former suit was terminated and rendered moot by the enactment of the Submerged Lands Act in May of 1953. At this point, however, we should like to emphasize the impropriety and injustice of attempting to follow the suggested procedure, and to examine the United States' contention that the present controversy involves exactly the same determinative facts and principles as those involved in the former proceedings.

It is California's position that the determinative facts and principles have been vitally affected by a number of events occurring subsequent to the submission of the Special Master's Report of October 14, 1952, and the filing of exceptions thereto by both parties in January 1953.

The most important of these events is, of course, the enactment in May 1953 of the Submerged Lands Act (67 Stats. 29, 43 U. S. C. §§ 1301-1315), which is determinative of the present rights of the parties. This Act was preceded by almost sixteen years of legislative history whose consideration is essential to its proper interpretation. The effect of the Act is to move the federal-state boundary from the ordinary low-water mark and the seaward limits of a state's inland waters, to the state's seaward boundaries. The location of these boundaries, and of the seaward boundaries of the marginal belt under the terms of the Act, involves

new and complex issues relating both to the establishment of baselines and the method or methods of determining boundaries derived from these baselines. It should be noted, for example, that the seaward limit of the marginal belt is not necessarily a mere transposition of the baseline three miles seaward. See Shalowitz, *Boundary Problems Raised by the Submerged Lands Act,* 54 Col. L. Rev. 1021, 1042-1043 (1954) (discussing methods of determining seaward boundaries of the marginal belt).

Although the Submerged Lands Act includes language similar to that contained in this Court's opinion and decree in *United States v. California,* and although to some degree the evidence introduced before the Special Master may also be relevant to a determination of the present controversy, the fact remains that the Master was called upon to determine the rights of the parties under the law as it then existed, while the present controversy, involving lands beyond the marginal belt, must be resolved on the basis of legislation enacted subsequent to the time of his Report. It would not be appropriate in this memorandum to make a detailed statement as to the present validity of the criteria and conclusions contained in the Special Master's Report. We think it is obvious, however, that where the rights of the parties are to be determined under an Act of Congress, a Report made without knowledge of the terms of that Act, not to mention its legislative history and subsequent judicial construction, can be of little or no value to this Court.

Subsequent court decisions, such as *Alabama v. Texas,* 347 U. S. 272 (1954), *Superior Oil Co. v.*

Fontenot, 213 F. 2d 565 (5th Cir. 1954), and especially this Court's opinions in *United States v. Louisiana,* 363 U. S. 1 (1960), and *United States v. Florida,* 363 U. S. 121 (1960), relate to the construction or effect of the Submerged Lands Act. Their consideration is, of course, absolutely essential to any determination or recommendation concerning the present rights of the United States and California in offshore lands. Merely by way of example, it should be noted that this Court's 1960 decision in *United States v. Louisiana,* 363 U. S. 1, at the very least casts grave doubt upon the present validity of the Special Master's assumption that the boundary determination is solely a question of external sovereignty. That case holds that the Submerged Lands Act was enacted for "purely domestic purposes" and that the right to exercise jurisdiction and control over the seabed and its subsoil is not restricted by the limit of territorial waters. (*id.* at 30-36.) The importance of factors other than external sovereignty is also shown by the Court's recognition that the purpose of the Act was to uphold the historical expectations and usage of the various states, and to confirm state title to the offshore lands they would have owned had the rule of *Pollard's Lessee v. Hagan,* 3 How. 212,* been held applicable to the marginal sea. (363 U. S. 1, at 16-20, 35.)

The Outer Continental Shelf Lands Act (67 Stats. 462, 43 U. S. C. §§ 1331-1343) also has an important bearing upon the present controversy. This statute, en-

*This case held that the shores of navigable waters within a state's boundaries, and soils under such waters, were not granted by the Constitution to the United States, but were reserved to the states respectively.

acted several months after the Submerged Lands Act, asserts jurisdiction over the seabed and its subsoil beyond the marginal belt. Implementing a Presidential Proclamation of 1945, it embodies Congressional recognition that the seaward limits of the nation's right to exploit the mineral and other resources of the lands underlying its coastal waters is not limited by traditional principles of external sovereignty. This being so, it is seriously questionable whether, as assumed by the Special Master, such principles of external sovereignty should be determinative of the purely domestic question concerning the division of these rights as between the nation and the states. This Act also recognizes that offshore boundary controversies may be resolved by settlement as well as adjudication, and authorizes Federal-State agreements respecting mineral leasing operations pending such settlement or adjudication. (43 U. S. C. § 1336).

To the extent that international law principles and unilateral acts of the Executive Branch of the United States in the exercise of foreign policy may affect the questions presently at issue, these principles and policies have not remained static during the ten year period which has elapsed since the Special Master's Report. Subsequent international law developments include the work and Report of the International Law Commission of 1956 [Official Records, U. N. General Assembly, 11th Sess., Supp. No. 9 (1956) (U. N. Doc. A-3159)], and the Geneva Conferences of 1958 and 1960, wherein great strides were made in the development and codification of international law principles. Especially significant are approval by the United States Senate on

May 26, 1960 (106 Cong. Rec. 11174-92) and ratification by the President on March 24, 1961 (44 Dept. of State Bull. 609) of the Convention on the Territorial Sea and the Contiguous Zone, after the Geneva Conference of 1958. (U. N. Doc. A/Conf. 13/L. 52.) By way of example, this Convention contains provisions relating to the use of straight baselines (Art. 4) and the use of the 24-mile closing line for bays (Art. 7, Para. 4), which may have an important effect upon the present controversy to the extent that international law principles may be deemed relevant thereto.* It would appear that any report and recommendation, to be of value to this Court, would have to consider developments of this nature which have affected or clarified the principles and policies regarded as determinative by the Special Master.

Finally, such factors as developments in offshore drilling technology, and Federal lease offers [28 Fed. Reg. 3218 (April 3, 1963)], have affected the present desirability of the procedure adopted by the Special

*Referring to this Convention in a recent letter to the Attorney General of the United States, Secretary of State Dean Rusk made the following assertion:

". . . Although the Convention is not yet in force according to its terms because twenty-two States have not yet ratified or acceded to it, nevertheless, it must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time. This is particularly so in view of the rejection by the International Court of Justice in the *Anglo-Norwegian Fisheries* case of the so-called ten-mile rule previously considered as international law by the United States and other countries. Furthermore, in view of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its present policy." 2 Am. Society of Int. Law, Int. Legal Materials No. 3, p. 528 (May, 1963).

Master which limited adjudication to particular coastal areas. Indeed, the United States Motion expressly states (at p. 8) that "changing conditions now impel us to seek an adjudication as to the whole California coast instead of certain segments." Under these circumstances, it would not seem proper to argue the case on the basis of coastal areas selected well over thirteen years ago [see Report of Special Master (Under Order of June 27, 1949)], thus delaying consideration of other areas whose determination may be a matter of greater importance today.

B. A New Proceeding Need Not Involve Re-presentation of Relevant Evidence

The foregoing demonstrates the anomaly and injustice of considering the present controversy on the basis of exceptions filed to the last Report of Special Master. The only advantage of supplemental proceedings would be the possibility of referring to the documentary and testimonial evidence introduced before the Special Master. California concurs with the United States in its desire to obtain a speedy determination of this controversy, and to avoid needless re-presentation of evidence heretofore introduced. Such duplication of effort can, however, be avoided without the attendant injustices of reviving the former proceedings. To the extent that the prior testimony may not be presently available, it will be admissible in any new proceedings, subject of course to any objections relating to competency, relevancy, or materiality. *Ruch v. Rock Island*, 97 U. S. 693, 694-695 (1878); *Hertz v. Graham*, 23 F. R. D. 17, 25 (S. D. N. Y. 1958); 5 Wigmore, *Evidence*, § 1388, p. 93 (3d ed. 1940). To the extent

that the prior evidence may not be admissible as a matter of right, both public entities herein will be free to explore the practicability of stipulating to the introduction of former evidence, where necessary, in order to expedite the new proceedings.

For these reasons, it is respectfully submitted that the fairest and most satisfactory way of disposing of the present controversy is a new suit for all purposes. The following comment of the Oregon Federal District Court, in refusing to allow a supplemental complaint, seems applicable to the present circumstances:

> "Such a cause could be decided without the heavy weight of incumbrance of past derelictions. The cause should not be compelled as was the ghost of Scrooge's partner Marley in 'A Christmas Carol,' to drag behind the chain of dead events."
>
> *United States v. Southern Pacific Co.*, 75 F. Supp. 336, 339-340 (D. Ore. 1947).

IV

The District Courts of the United States Have Concurrent Jurisdiction Over the Present Controversy and Constitute the Most Suitable Forum for Its Resolution

It is of course "within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the Constitution with original jurisdiction." *Case v. Bowles*, 327 U. S. 92, 97 (1946); *Ames v. Kansas*, 111 U. S. 449, 469 (1884); *United States v. State of Washington*, 233 F. 2d 811, 813 (9th Cir. 1956).

Congress has chosen to exercise this power in cases between the United States and a state, involving con-

troversies of this nature. Section 1251(b)(2) of Title 28 of the United States Code provides that: "The Supreme Court shall have original but not exclusive jurisdiction of . . . all controversies between the United States and a State. . . ." Section 1345 of Title 28 provides that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. . . ." These sections have been expressly held applicable to cases involving real property disputes arising under Federal law. *United States v. State of Washington, supra.*

As stated in *California v. Southern Pacific Co.,* 157 U. S. 229, 261 (1894), the original jurisdiction of this Court "is limited and manifestly intended to be sparingly exercised. . . ." This is illustrated by *Georgia v. Pennsylvania R. Co.,* 324 U. S. 439 (1945), wherein this Court exercised its original jurisdiction by granting leave to file an amended bill of complaint, but only because of the peculiar provisions of the Clayton Act under which the plaintiff had no "proper and adequate remedy" apart from the original jurisdiction of this Court (p. 466). In the course of this decision, it is stated that:

> "The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency, and justice." (pp. 464-465.)

See also:

Massachusetts v. Missouri, 308 U. S. 1, 19 (1939);

Georgia v. Chattanooga, 264 U. S. 472, 483 (1924).

The original jurisdiction of this Court does not appear to be the forum best adapted to adjudicate the present controversy. The United States has pointed out that even a hearing limited to selected segments of the California coast became extremely lengthy and time consuming (United States Motion, p. 9). They represent that "changing conditions now impel us to seek an adjudication as to the whole California coast instead of certain segments." (United States Motion, p. 8.) It seems apparent that such an adjudication would involve the presentation of massive testimonial, documentary, and physical evidence, most of which will be readily available only in the vicinity of the area in question.

If this Court should retain jurisdiction, the appointment of a new Special Master would, of course, be absolutely essential. A Master appointed by this Court to conduct such an adjudication would be handicapped by limitations and perhaps ambiguities as to his authority to make both procedural and substantive rulings. A Federal District Judge would not be so handicapped. Even if the District Court found it necessary to refer to a Master certain matters of a technical or time consuming nature, the scope of such reference could be much narrower than would be necessary were a reference made by this Court. Furthermore, the ready availability of the District Judge to make rulings and

give instructions in the course of the hearings would expedite the adjudication to a substantial degree. Ultimately, this Court and the parties would have the benefits of the normal appellate processes, including decisions by the District Court and, if necessary, the Court of Appeals.* As illustrated by the prior reference in *United States v. California,* where the hearings took place over a five year period, the amount of time consumed by original proceedings in this Court could equal or exceed that required in following more usual procedures.

V

The Case of United States v. California No. 5, Original Should Be Dismissed

A. The Passage of the Submerged Lands Act Rendered This Case Moot

From the foregoing, it is clear that there is no longer a case of controversy concerning the subject matter of the former suit, that the effect of the decree therein has terminated, and that the suit may not be revived in the guise of "supplementary proceedings." Under these circumstances, the former proceedings are rendered moot since this Court can no longer take effective action concerning the subject matter of the former suit. As stated in *Brownlow v. Schwartz,* 261 U. S. 216, 217-218 (1923):

> "This Court will not proceed to a determination when its judgment would be wholly ineffectual for

*Intermediate review by the Court of Appeals could be bypassed, if deemed desirable, under 28 U.S.C. §§ 1254 (1) and 2101 (e) providing for Supreme Court review by certiorari before rendition of judgment by the Court of Appeals. See *Gay v. Ruff,* 292 U. S. 25, 30 (1934).

> want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

See also: *Parker v. Ellis,* 362 U. S. 574, 575 (1960).

Where there is no actual matter in controversy essential to the decision of the particular case before it, the Court will not make a determination in that case simply because it may be convenient in the resolution of different controversies between the same parties. This is demonstrated by the following language of this Court in *United States v. Alaska S.S. Co.,* 253 U. S. 113, 115-116 (1920), where, as here, the existing controversy was terminated by the enactment of a statute:

> ". . . We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellants' brief it is insisted that the power of the Commission to prescribe bills of lading is still existent, and has not been modified by the provisions of the new law. But that is only one of the questions in the case. *It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of*

> *the particular case before it.* Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.' . . ." (emphasis added.)

See also: *California v. San Pablo and Tulare Railroad,* 149 U. S. 308, 314 (1893).

Once a proceeding becomes moot, the established practice of this Court is to order a dismissal. Indeed, the defendant is entitled to a dismissal as a matter of right and the Court will consider the question of mootness at any stage of the proceeding, however presented or suggested. *Brownlow v. Schwartz,* 261 U. S. 216, 218 (1923); *United States v. Hamburg American Co.,* 239 U. S. 466, 475, 478 (1916); *Puget Sound Power and Light Co. v. City of Seattle,* 271 Fed. 958, 963 (W. D. Wash. 1921).

B. This Case Also Should Be Dismissed for Failure of Prosecution

As has been noted previously, more than ten years have elapsed since any action has been taken by the plaintiff herein, during which time the entire posture of the controversy between the parties has, at the very

least, been radically altered by supervening events. The United States Motion makes no attempt to explain or justify this delay.

Rule 41(b) of the Federal Rules of Civil Procedure provides that an involuntary dismissal may be granted "(f)or failure of the plaintiff to prosecute." Rule 9(2) of the Supreme Court Rules provides that the Federal Rules, ". . . where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

One basis for the rule requiring dismissal for failure of prosecution is the fact that such a sanction ". . . is necessary in order to prevent undue delays in the disposition of pending cases." *Ling v. Wabash R. R.*, 370 U. S. 626, 629 (1962). As stated in *Sweeney v. Anderson*, 129 F. 2d 756, 758 (10th Cir. 1942):

> "The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice. These goals cannot be attained without the exercise by the courts of diligent supervision over their own dockets. Courts should discourage delay and insist upon prompt disposition of litigation. Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination. . . ."

See also: *Messenger v. United States*, 231 F. 2d 328, 330-331 (2d Cir. 1956) (holding that "complete lack of any prosecutory effort" for a period of six years rendered dismissal mandatory); and *Janousek v. Wells*,

303 F. 2d 118, 122 (8th Cir. 1962) (affirming dismissal for lack of prosecution).

Conclusion

The State of California respectfully requests that this matter be calendared for oral argument, that the United States Motion for Leave to File Supplemental Complaint or Original Complaint be denied or, alternatively, that any complaint filed herein be deemed to commence a new and separate suit for all purposes, and that California's motion to dismiss be granted.

Respectfully submitted,

STANLEY MOSK,
Attorney General of California,

CHARLES E. CORKER,
HOWARD S. GOLDIN,
Assistant Attorneys General,

JAY L. SHAVELSON,
WARREN J. ABBOTT,
N. GREGORY TAYLOR,
Deputy Attorneys General,

Attorneys for State of California.